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REPORT ON
NATIONWIDE USE OF FORMER JUDGES

S.B. 612

1977 C.2

I. Nature of Report

This report examines the use of former judges for temporary judicial service in the United States and is based on an analysis of responses received to a request for information from State Court Administrators as to the authority, qualifications, and limitations under which they are called and the manner in which the compensation is determined. Responses were received from 43 jurisdictions, the nature of which varied among the jurisdictions. Thirty-two responses are considered in this study.

Out of the 43 responding, only four jurisdictions stated that use of such judges is not currently authorized. However, one jurisdiction reported that a constitutional amendment permitting recall was on the November 1976 ballot; in another, such authorization becomes effective January 1, 1979; yet in another, legislation will be submitted to its 1977 legislature. The fourth jurisdiction, while not yet having taken some definitive action in this regard, fully expects to do so. This report highlights some of the approaches that have been taken and some of the provisions that are currently in effect.

II. A Valuable Resource - Maximum Use of Judicial Manpower - Not a Substitute for Additional Judges

Long-range planning to establish the appropriate levels of judicial manpower in the circuit courts and the District Court is the goal of the Judicial Branch of Government in Maryland.

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However, short-range planning to meet the needs of the courts of this State is, likewise, an essential ongoing process. The need for maximizing the use of available judicial manpower has been clearly identified, and in an effort to meet that immediate need, the Conference of Circuit Administrative Judges in November 1975 approved and recommended for adoption by the Chief Judge of the Court of Appeals a Temporary Judicial Assignment Plan for the Circuit Courts.

The Chief Judge of the Court of Appeals adopted the plan recommended by the Conference and by Administrative Order directed its implementation, effective January 1, 1976. During the period January through December 1976, the Chief Judge, pursuant to the authority vested in him under Article IV, Section 18A of the Maryland Constitution to assign any judge to any court in this State, exercised this authority by assigning 32 circuit court judges to circuit courts outside their respective circuits for a total of 145 judge days. Minus weekends and holidays there are 246 available working days a year in Maryland which means that these judges sat for approximately 60 percent of one judge year outside their own circuits. Providing assistance caused by extended illnesses and long, unfilled vacancies accounted for a substantial number of assignments. In point of fact, one circuit court was provided with 80 judge days of assistance due to an unfilled vacancy. During the same period, the Chief Judge of the Court of appeals made 25 assignments of District Court judges to sit at the appellate and circuit court level for a total of 277 judge days. And, the Chief Judge of the District



Court made, within that court, 300 assignments for a total of 3 judge days. District court judges were assigned to cover vacations, vacancies, illnesses, and where circuit court assistance could not be provided because the demands for help were more than the circuits could meet.

While assistance will continue to be provided for other reasons; namely, to assist the courts in handling the volume of business before them, it is not the primary reason and demonstrates that this system is no a substitute for additional judicial manpower above the authorized complement.

While the plan has been of some help to the circuits requesting assistance, it should be emphasized that the result is a degree of disruption in the circuit providing assistance since the judge assigned is not available in his own circuit court. Even though the court from which he is assigned may have a smaller caseload in comparison, court business is affected and litigants are inconvenienced. And, of course, the degree of disruption depends upon the length of his absence. A pool of qualified former judges available for service in these kinds of situations, as well as others, would minimize the disruption in the judicial system in Maryland.

Overview in a Matrix - Analysis

A nation-wide examination of constitutional and statutory provisions, and court rules and procedures governing the use



of former judges, reveals several considerations for determining eligibility for recall and the compensation paid. A ready reference table in the form of a matrix reflects these considerations and is made a part of this report. No "X" means no response or it was too incomplete to report. The analysis of the various factors considered is based solely on the responses received from the different jurisdictions. No additional research was undertaken or additional information requested.

Authority for Recall, Qualifications, Limitations, Compensation

.. Constitutional/Statutory Provisions, Court Rule and Procedures

Based on the information reported, only Colorado bases its authority to recall solely on the constitution. Twelve states draw upon the constitution and statutes, the latter of which, in many cases, deals only with compensation. Fourteen states draw upon a statute only as the authority for utilization of former judicial officers. Only four states have adopted court rules or procedures either to implement the constitutional or statutory authority. This is not to say that administrative procedures are not being followed, but it was not reported in the responses received.

. Qualifications - Age

Twenty-eight jurisdictions reported in this study did not specify age as a condition of eligibility for temporary judicial service. Only North Carolina utilizes retired judges up to the mandatory age of 70 and then ceases the practice. From reading the information provided, particularly



with reference to the fact that, generally, eligibility for retirement is based on age and length of service, suggests that the jurisdictions are not concerned and/or have not yet addressed the matter, or handle the matter administratively. These formal or informal administrative practices were not reported.

2. Recall Upon Whose Request - Approval

Twenty-seven states indicate that the recall of a former judge is upon the request of either the state's highest judicial officer or the presiding judge of a trial court. However, in Alabama, Idaho, Kentucky, Maine, and Texas, recall may also be entertained by the governor. While these states have provisions in this regard, it is little or no concern to Maryland because the constitutional amendment just ratified places the authority and the responsibility solely within the Judicial Branch of Government. One state, namely Utah, gives a role to the State Court Administrator and in the code defining his powers and duties, provides that he "may, with the consent of the chief judge and with the consent of retired justices of the Supreme Court, or retired judges of the district, juvenile or city courts, or an active juvenile or city court judge, call said judge to serve temporarily as a district judge and fix reasonable compensation for such services."

Only seven jurisdictions reported in this analysis indicate that the highest court, as a whole, plays a role



in the recall process. More specifically and for this report this provision is defined to mean that the constitutional or statutory provision refers to the highest court of the state, whatever it may be called, as the court that recalls former judges as distinguished from the procedure where it is done solely on the request of the Chief Justice. At least one state reported that although the statute refers to the highest court of the state as being the court that recalls former judges, in actual practice, however, it is the Chief Judge or Justice. Here too, the extent to which the entire court is involved in the process is really not relevant to Maryland because the constitutional amendment requires approval of a majority of the Court of Appeals.

D. Consent

Twenty-five of the 32 jurisdictions reported in this analysis address the issue on the need for consent of the former judge. Three jurisdictions, Alabama, Idaho, and North Carolina apparently make it obligatory upon the former judge to serve whenever he is requested to do so. Virginia imposes the obligation upon retired judges under 70 years of age when the request is made; however, consent is required if they are over 70. Most do not recall judges without consent.

E. Eligibility - Served Full Term or Specified Period

Only a few jurisdictions indicate that either a full term or a specific term of prior service is required as a condition of eligibility.



For example, Georgia has instituted an "emeritus judge" program in its general trial court and once a judge of the Superior Court has served 16 years, he is appointed to the office of "emeritus judge" of the Superior Court. As such, he becomes eligible to retire and can be called upon with his consent to serve in any Superior Court in the state.

In Oregon, a judge who retires after a total of 12 or more years of service as a judge of one or more of its courts, except one retired under disability, is designated a senior judge and is eligible for temporary assignment with his consent.

In Pennsylvania, pursuant to rule adopted by its Supreme Court, a judge is qualified for assignment only if he has served for an aggregate 10 years.

However, with respect to most jurisdictions, we suggest that the recall process is intertwined with eligibility for retirement; namely, that in order for a judge to be eligible for retirement, he or she must have served a certain number of years and this apparently satisfies any years of service consideration concerning eligibility for recall.

F. Consent of Counsel

In only one state the assignment of a judge to a case requires prior consent of counsel. The absence of such a provision in any other jurisdiction might suggest that it is logistically unfeasible to require consent of counsel, particularly where the assignment is to a court generally and not to a case.



G. Limitation - Engaging in the Practice of Law

Eleven, or one-third of the jurisdictions reported in this study make specific reference to this issue in their constitutional, statutory provisions, or court rules. The other responses were silent on this matter, which does not necessarily suggest that this factor is not considered but it was not reported. Reference to different state policies are appropriate because it is an important consideration.

1. California

In this state where judges are eligible for temporary assignment even though not receiving retirement benefits, an informal administrative procedure has been adopted by the Chief Judge and is consistently followed; namely, not to assign retired judges engaged in the practice of law. Neither the constitution nor statute makes any reference to this limitation.

2. Delaware

Delaware's statute does not permit the recall of a former judge who is "actively engaged in the practice of law." No definition of the words "actively engaged" is given.

3. Florida

Neither the constitutional nor the statutory provisions speak to this limitation. However, in July 1976, the highest court of the state adopted a rule which provides:

"For the purposes of judicial administration, a judge in retirement eligible for recall to judicial service is defined as a judge not engaged in the practice of law who has been a judicial officer of this State and who is eligible to draw or is drawing retirement compensation under the retirement laws applicable to judicial officers ...

"Where a judge eligible to draw retirement compensation has, subsequent to judicial service, entered the private practice of law or any other nonjudicial activity, he or she may be eligible for recall to judicial service upon cessation of the private practice of law and approval of his or her application to this court. The application shall state the period of time he or she has not engaged in the practice of law, and it must be approved by the court before the judge will be eligible for recall to judicial service."

Florida apparently permits retired judges drawing benefits to practice law.

4. Iowa

In speaking to the recall of judges retired by reason of age and/or drawing benefits, Iowa's statute states:

"No such judge shall engage in the practice of law unless he shall file with the clerk of the Supreme Court and election to practice law, in which event he shall thereafter be ineligible for assignment to temporary duties at any time ..."

5. New Jersey

New Jersey's statute provides:

"No member of the retirement system shall, while receiving a pension ... engage in the practice of law before any of the courts of this State ... Subject to rules of the Supreme Court, any justice of the supreme court who has retired on pension may with



his consent be recalled by the Supreme Court for temporary service in the supreme court or elsewhere within the judicial system ..."

Rules of the New Jersey Supreme Court provide:

"All recalled retirees must terminate all law practice and 'of counsel' associations, as in the case of active-service judges. Temporary 'leave of absence' for recall for temporary service within the judicial system will not be permitted ..."

6. Ohio

The Ohio constitutional and statutory provisions are silent on the issue but it is addressed by court rule. A condition for eligibility is a retired judge "who is not engaged in the practice of law."

7. Pennsylvania

Pennsylvania's constitution is silent on this issue but like Ohio, it is addressed in a Supreme Court rule which provides:

"A former or retired judge who consents to accept assignment on a temporary judicial service shall file with the Administrative Office a statement of the period during which he is willing to be assigned to a court, and a certification that he has not, since his last judicial duty, engaged in the practice of law or in any activity incompatible with judicial office and does not intent to engage in the practice of law in the future ..."

8. Texas

Although it is not entirely clear, the practice in Texas might be interpreted to mean that retired judges engaged in the practice of law are not eligible for recall. Statute clearly provides that retired



judges receiving retirement benefits are not allowed "to appear and plead as attorney's at law in any court in this state."

However, the wording suggests that if they are engaged in the practice of law, but not in "trial practice," they might be eligible for recall.

9. Utah

Utah addressed this subject by an administrative procedure formally adopted by the Supreme Court. A former judge is qualified if he is not engaged in the practice of law. However, this does not apply to city judges acting as substitute judges who may handle uncontested probate matters. The policy goes one step further and qualifies a former judge provided he does not have "a partner engaged in the practice of law."

10. Wisconsin

Wisconsin's statute provides:

"A justice or judge retired under the provisions of Article VII, Section 24, of the constitution, who shall serve temporarily as a circuit judge ... shall not appear as an attorney nor act as counsel in any contested matter in any court in the county in which he has so served for a period of one year after such service. Neither the act of serving as a circuit judge in another county, nor the performance of conciliation or pretrial duties ... shall effect his eligibility to engage in the practice of law."

11. Wyoming

Here, too, the statute simply provides that a judge is eligible for recall if he is not "practicing law."



H. Limitation - Not Rejected in Election or for Appointment

Out of the 32 jurisdictions being reported in this study, only the states of Nevada, Pennsylvania, and Wisconsin made specific reference to these limitations.

In Nevada, specific reference to this issue is in a constitutional amendment (on the ballot November 2, 1976) which would give the Chief Judge the authority to recall former judges who were not removed or retired for cause or defeated for retention in office.

Pennsylvania provides by a court rule that in order to be qualified for assignment "such judges shall not have been defeated for re-election ..."

In Wisconsin, "a person who has served four years or more as a county judge, and who was not defeated at the most recent time he sought re-election, but is no longer a county judge, may serve temporarily ..."

The few jurisdictions reporting on this issue, again, does not necessarily suggest it is not handled administratively, but the responses were silent.

I. Medical Certification of Fitness, Otherwise Able or Not Under a Disability

Seven out of the 32 jurisdictions being reported in this analysis addressed this issue. Twenty-five were silent, but again this does not necessarily suggest that the matter is not considered.

All judges who had retired by reason of physical or mental disability are automatically excluded from consideration.



Other states simply addressed the issue by conditioning eligibility on the judge being "willing and able" to serve. No further definition or clarification of the work "able" was provided.

Some references to constitutional or statutory provisions bear mention:

1. District of Columbia

"A judge retired for reasons other than disability may perform, upon designation of the Chief Judge, those judicial duties which he is willing and able to undertake."

2. Idaho

In Idaho a retired judge is eligible for recall provided "he remains capable." No explanation or definition of the word "capable" was provided.

3. Nebraska

Nebraska disqualifies any former judge who has retired on account of disability. However, it does not go any further.

4. New Jersey

The New Jersey statute is silent on this subject. However, a rule of the Supreme Court establishes a prerequisite for recall "a certificate by a medical doctor, attesting that the retiree is mentally and physically qualified to perform the proposed temporary service withing the judicial system. The Administrative Office of the Courts will pay the cost of such examination,



by a doctor designated by the Supreme Court and the cost of further examinations, which may be required at any time."

New Jersey provided the most information on this particular issue.

5. North Carolina

The North Carolina constitution is silent on this issue but the statute provides:

"The Chief Justice of the Supreme Court may order any emergency judge, who, in his opinion, is competent to perform the duties of a superior court judge ..."

No further explanation as to the word "competent" was provided.

6. Rhode Island

Rhode Island's statute provides:

"A justice of any of said courts who shall retire in accordance with the provisions of this section may, at his own request, ... subject to the retiree's physical and mental competence be assigned ..."

7. Utah

As stated previously, Utah has adopted administrative procedures for the recall of former judges and one of its provisions is that a former judge shall be "physically and mentally able to perform the duties of the office."

J. Limit on Service

Very few jurisdictions addressed this issue in the responses. Where no specific reference was made to a limit



on service, no "X" was entered in the tabular analysis. Generally speaking, however, the constitutional and statutory provisions simply provided that the judge shall serve as long as needed.

1. Maine

In Maine, any judge who retires pursuant to its provisions pertaining to the retirement of judges may be appointed an "Active Retired Justice of the Supreme Judicial Court for a term of seven years unless sooner removed and such justice may be reappointed for a like term." Similar provisions exist for judges of other courts and, as with judges of the Supreme Court, may be appointed by the Governor with the advice and consent of the Judicial Council as Active Retired Judges for a term of seven years subject to reappointment.

2. New Jersey

By rule of the Supreme Court "recall and termination will be at the pleasure of the Supreme Court, with orders for a maximum period of two years, and which may be renewed from time to time by further order of the Supreme Court for the additional periods of not exceeding two years."

3. Virginia

The State of Virginia sets a period not to exceed 90 days at any one time but makes no provision for renewal.



K. Compensation

All but a few of the 32 jurisdictions being reported in this study provided sufficient information as to the compensation paid to a former judge recalled for temporary judicial service. As can be seen from an examination of the matrix analysis, most states provide compensation which represents the difference between retirement allowance and the annual compensation paid to an active judge. Some states pay no compensation but merely reimburse the former judge for his actual expenses incurred while serving on temporary assignment.

Some provisions representative of a majority of responses are as follows:

1. California

It provides:

"Whenever a judge retired as such under the Judges' Retirement Law is assigned to sit in a court, he shall be compensated while sitting at a rate 92% of the full compensation of a judge of the court to which he is assigned. A retired judge of a justice court [underlining supplied] assigned to sit in a court shall be compensated while so sitting at the full compensation of a judge of the court to which he is assigned....

"If such compensation is greater than his retirement allowance, his retirement allowance shall be suspended as long as he receives such compensation. If such compensation is less than his retirement allowance, his retirement allowance shall be continued to be paid while he receives such compensation but only in an amount equal to the difference between such compensation and the retirement allowance to which he would otherwise be entitled."



2. Delaware

"Any retired judge accepting active duty designation pursuant to a constitutional or statutory authorization shall be compensated on the per diem basis of \$100 per day, but in no event shall the total compensation received on a per diem basis when added to his retired pay exceed the then current annual salary of the judicial position from which such judge has retired."

3. District of Columbia

"Any retired judge performing full-time judicial duties on the District of Columbia Court of Appeals or the Superior Court shall be entitled, during the period for which he serves, to receive the salary of the office in which he performs such duties, but there shall be deducted from such salary an amount equal to his retirement salary for that period. No deduction shall be withheld for health benefits, federal employees life insurance, or retirement purposes from the salary paid to a retired judge during judicial service. The performance of such judicial service shall not create an additional retirement, change a retirement, or create or in any manner affect a survivor annuity."

4. Florida

Florida's statute provides:

"... Any such justice or judge shall be paid as additional compensation the difference between the normal retirement benefits to which he was entitled to receive at the time of his retirement, ... and the total salary then currently paid by the state to active justices or judges of the court in which the retired justice or judge was serving at the time of his retirement.

"Such additional compensation shall be paid by the State at a daily rate and shall be computed on the basis of 261 working days per annum; provided that such payments shall be computed on the basis of actual number of days worked.

"Necessary travel expenses incident to the performance of duties required by assignment of such justices or judges to active judicial service shall be paid ..."



5. Idaho

"During the period that any such retired magistrate is serving and holding court ... he shall be entitled to receive all of his regular retirement benefits ... together with an additional sum as compensation for his services sufficient to amount to an aggregate sum of retirement benefits and additional compensation so as to be equal to the current salary of the judicial office from which such magistrate has retired."

However, Supreme Court justices and District justices in the State of Idaho are paid at the current salary of the office from which he retired but during such period shall not be entitled to receive nor have paid to him his retirement compensation and any period of service so rendered by a retired judge shall not be computed for additional retirement benefits. The state does not receive or deduct any such sum from the salary of any such retired judge or justice for such services.

6. Kentucky

"Any retired justice or judge assigned to active judicial service ... shall be compensated for his service as follows:

- (1) The salary for each day which the justice or judge serves shall be the difference, if any, between $1/250$ of annual retirement benefits and $1/250$ of the annual salary for the judicial office in which he performs the judicial duties. However, this section shall not be construed to require a reduction in retirement benefits if the applicable salary would be less than the retirement benefits."

In addition, necessary and reasonable expenses incidental to the judges' performance are also paid.



7. New Jersey

"Upon such recall, a retired justice or judge ... shall be paid a per diem allowance fixed by the Supreme Court in accordance with its rules, provided, however, that in no event shall he receive a salary which together with the pension exceeds the current salary of a judge or justice of the court from which he retired."

In addition, the former judge is also compensated for actual expenses incurred during service.

In New Jersey, by rule and because of the varying differentials between retirees' pensions and the current salaries of the courts from which they retired, the per diem allowance for all judges has been tentatively set at \$75.

8. Wyoming

Wyoming's provision is typical of a number of states in regard to the compensation provision and provides:

"A retired justice or judge shall receive as a salary during any period of assignment, the difference between his retirement allowance as provided by law and the current compensation of a judge of a court to which he is assigned ..."

A retired judge also receives, in addition to compensation, reimbursement for necessary expenses incurred while serving on temporary judicial assignment.

Analysis of the provisions relating to compensation suggests that states did not address themselves to the compensation that should be paid to a former judge who is neither retired nor if retired, receives retirement benefits.



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V. Conclusion

It is hoped that this analysis provides some insight to the approaches taken in this country to bring into service this valuable resource, not as a substitute for additional manpower, but as an attempt to maximize the use of available judicial manpower to address critical and ongoing needs of the Judicial System.



Authority, Qualifications, Limitations, Compensation

[illegible]



Authority, Qualifications, Limitations, Compensation

[illegible]



(Not current)

State/Jurisdiction	Constitutional Provision	Statute	Court Rule	Administrative Procedure	Retired but Over 70	Retired but Under 70	Retired only (no age limit)	Recommended by Committee of Judges	Request of Chief Judge of Highest Court and/or Trial Court	Approval by Majority of Court	Consent Required	Served one full term or a specified Period	Consent of counsel	Prohibited from practicing law	Not rejected in election	Not rejected for appointment	Medical certification of fitness or otherwise able; not under disability	Limit on service	No Limit on service	Waives retirement, full salary	Receives retirement - per diem difference between full salary	No compensation, expenses only	Performance evaluated by committee of judges
Montana																							
Nebraska	X	X					X		X	X	X						X						
Nevada on ballot 11/2/76	X						X		X		X				X								
New Jersey		X					X	X	X	X				X			X				X		
New Mexico (Not currently authorized - legislation drafted)																							
New York																							
North Carolina	X	X				X			X		NO						X					X	
North Dakota		X					X		X	X	X											X	
Ohio	X	X	X				X		X		X			X							X		
Oklahoma																							
Oregon	X	X					X			X	X	X									X		
Pennsylvania	X		X				X		X		X	X		X	X	X					X		

retirement
also



USE OF RETIRED JUDGES NATIONWIDE

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